No. 91-1345

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE COALITION FOR ECONOMIC EQUITY; SAN FRANCISCO HISPANIC CHAMBER OF COMMERCE; ASIAN INC.; and SAN FRANCISCO BLACK CHAMBER OF COMMERCE,

Respondents-Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUISE H. RENNE
City Attorney
MARA E. ROSALES-CORDOVA*
Deputy City Attorney
206 City Hall
San Francisco, CA 94102
(415) 554-4218

Attorneys for Respondent City and County of San Francisco

**Counsel of Record for Respondent*

EVA JEFFERSON PATERSON*
THEODORE HSIEN WANG
SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS
301 Mission Street, Suite 400
San Francisco, CA 94105
(415) 543-9444

Attorneys for Intervenors

**Counsel of Record for Intervenors*

[Additional counsel for Intervenors listed on inside front cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CONTINUED LIST OF COUNSEL FOR INTERVENORS

JUDITH KURTZ
EQUAL RIGHTS ADVOCATES
1663 Mission Street
Suite 550
San Francisco, CA 94103
(415) 621-0672

Attorneys for Intervenors

BIRGIT SEIFERT
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
11th Floor
Los Angeles, CA 90014
(213) 629-2512

Attorneys for Intervenors

WILLIAM C. MCNEILL, III
EMPLOYMENT LAW CENTER
1663 Mission Street
Suite 400
San Francisco, CA 94103
(415) 848-8848

Attorneys for Intervenors

QUESTION PRESENTED

Did the Ninth Circuit err in affirming the District Court's decision that petitioner failed to establish a basis to preliminarily enjoin the implementation of San Francisco's Minority/Women/Local Business Utilization Ordinance as it relates to the award of public construction contracts?

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STATEMENT OF CASE

1. Relevant Background of Legislative Process.

About the time of this Court's decision in *City of Richmond v. Croson*, 488 U.S. 469 (1989), the legislative body of the City and County of San Francisco ("the City"), its Board of Supervisors ("the Board"), was in the process of evaluating whether to extend its Minority/Women/Local Business Utilization Ordinance – I ("1984 ordinance").[1] A part of this process involved an analysis of whether, in light of *Croson*, there was a factual basis for extending the 1984 ordinance. Appendix A to the Petition for Writ of Certiorari ("Pet.") at A7.

To answer this question, the Board embarked on an extensive fact-finding process. Appendix C to Pet. at C2, Section 12D.2. The Board received two statistical studies, one from its Budget Analyst and the other from a private consultant, BPA Economics, Inc. The Board also reviewed the 1983 and 1989 reports prepared by the Human Rights

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[1] On March 23, 1987, the Ninth Circuit decided *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), *petition dismissed*, 493 U.S. 928 (1989) ("*AGCC I*"). That decision considered provisions of the City's 1984 ordinance. The relevant portions of this decision are discussed *infra*.

Unrelated to *AGCC I* but while that litigation was pending for decision in the Ninth Circuit, in 1986, the San Francisco electorate adopted an amendment to Charter Section 7.200. That amendment, discussed *infra*, allows the Board of Supervisors to adjust by ordinance the competitive bidding threshold for the award of construction contracts. Appendix A at A22.

Commission ("HRC"). *Id.* at C2-C3. In addition, the Board conducted ten public hearings, took testimony and written submittals. *Id.* at C2. San Francisco was selected as the "relevant market" for purpose of the statistical studies. *Id.* at C9.

Relying on this evidence and compiling a voluminous legislative record, on May 22, 1989 the Board unanimously adopted Ordinance No. 175-89 ("1989 Ordinance"). Appendix A at A7; Appendix B to Pet. at B5-B6, and fn. 3. The law became effective July 1, 1989. Appendix C at C41, Section 12D.18.

2. District Court's Decision.

Soon after the 1989 Ordinance became law, petitioner Associated General Contractors of California, Inc. ("AGCC") filed an action against the City for declaratory and injunctive relief. AGCC also moved the District Court for a preliminary injunction. The *only* evidence of "irreparable injury" AGCC offered the District Court was the declaration of a contractor who claimed to have made a business decision not to bid on City construction contracts. Appendix B at B9.

After considering the evidence submitted by the parties, the District Court denied AGCC's motion for preliminary injunctive relief. Specifically, the lower court found that AGCC did not establish "a sufficient threat of irreparable injury to warrant a mandatory injunction at this juncture." Appendix B at B32. In addition, the District Court concluded that AGCC had "not persuaded this Court that it is likely to succeed on its claim that the 1989

Ordinance fails to serve the compelling interest of remedying the effects of past discrimination by the City of San Francisco against San Francisco based MBEs [minority business enterprises], or its claim that challenged portions of the Ordinance are not narrowly tailored to that goal." *Id.* at B32.

The Ninth Circuit affirmed the denial of AGCC's motion for preliminary injunction on December 6, 1991. *See* Appendix A at A2. AGCC did not petition for a rehearing.

SUMMARY OF ARGUMENT

There are no sound reasons to grant the petition for a writ of certiorari in this case, especially since petitioner is merely appealing a denial of a preliminary injunction. Indeed, AGCC's petition raises a number of factual issues that would be best resolved by the District Court. Because of the interlocutory nature of this appeal, AGCC will have ample opportunity to raise these questions and present evidence before the District Court. Allowing this case to go to final judgment may lead to a result that will make it unnecessary to decide the issues raised in this petition.

There is no evidence that AGCC members have suffered irreparable injury due to the application of the City's MBE preference program. AGCC also has failed to demonstrate a likelihood of success on the merits on either the state law or constitutional claims. California state law clearly allows the people of San Francisco to

authorize its legislative body to determine the appropriate monetary threshold at which construction contracts should be competitively bid.

Further, the 1989 Ordinance is constitutional. San Francisco's MBE ordinance shares no similarities with the MBE plan in *Croson*. The City relied on extensive and compelling evidence that MBEs faced discrimination within the City's procurement system. San Francisco concluded from the evidence that MBEs suffered competitive disadvantages caused by the City's discriminatory practices. In response, the City adopted a modest remedial program, carefully tailored to address the identified competitive disadvantages.

Accordingly, the Ninth Circuit correctly affirmed the District Court's denial of AGCC's motion for preliminary injunctive relief.

REASONS THE PETITION SHOULD BE DENIED

I. AGCC PRESENTS NO COMPELLING REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

AGCC argues that this Court should grant certiorari for two reasons: (1) the Ninth Circuit decision has departed from the accepted and usual course of judicial proceedings; and (2) the decision conflicts with this Court's decision in *Croson*. AGCC Brief ("AGCC Pet.") at 5-6. Neither reason merits the granting of the petition.

A. This Court Should Not Grant Certiorari Because There Remain Factual Disputes That Need to be Resolved by the District Court.

The exercise of this Court's certiorari jurisdiction is to occur only in very limited circumstances. "[E]xcept in extraordinary cases, the writ is not issued until the final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The petition before this Court, requesting review of a preliminary injunction denial, should be denied because the petition raises a number of issues that can be properly addressed in the District Court.

At the outset, AGCC asserts that "[t]here is nothing further which could be adduced at trial as to whether the necessary facts of prior discrimination had been found by the City and whether the remedy the City elected was narrowly tailored to those facts." AGCC Pet. at 6. However, AGCC's own arguments undercut this assertion by focusing on factual disputes in the record. AGCC Pet. at 14-15. For example, AGCC challenges the selection of San Francisco as the "relevant market" for purposes of the statistical study by BPA Economics, Inc. *Ibid; see Croson*, 488 U.S. at 502, 505; Appendix A at A33; *see also* Appendix B at B17, fn. 15. But AGCC does not identify a more relevant market for City construction contracts, Appendix B at B17, fn. 15, and cannot do so at this preliminary stage of the proceedings. Only through additional discovery could AGCC ascertain whether the proper "relevant market" for a statistical disparity study is a geographical area larger than San Francisco.[2]

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[2] While AGCC contends that "the City frequently contracts with firms from outside its limits" (AGCC Pet. at 14-15),

(Continued on following page)

AGCC also complains that the Court of Appeals "dismissed AGCC's challenge to the manipulation of statistics by City to achieve a lower MBE participation rate." AGCC Pet. at 15. Again, the dispute is factual. Moreover, as the Ninth Circuit noted, AGCC's claim of error was rebutted by evidence submitted by the City. Appendix A at A35. Accordingly, "the District Court's finding that the BPA statistics were reliable was not clearly erroneous." *Ibid.*

This Court has consistently refused to grant certiorari to review factual findings affirmed by a court of appeals. *See Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) [court will not review concurrent findings of fact by lower two courts "in the absence of a very obvious and exceptional show of error"]; *see also Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967); *Branti v. Finkel*, 445 U.S. 507, 512 fn. 6 (1980); *United States v. Doe*, 465 U.S. 605, 614 (1984). In any event, if AGCC desires to provide additional evidence disputing the City's statistics, the appropriate forum for establishing this point is the District Court.

B. AGCC Can Obtain Adequate Relief From the Lower Courts.

AGCC argues that unless this Court grants certiorari, AGCC will be unable to obtain effective relief from race-based preferences. AGCC focuses upon the fact that the 1989 Ordinance is effective for only three years, though it

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this contention, even if true, does not establish that the relevant market is larger than San Francisco.

can be extended for three-year periods. AGCC Pet. at 7; *see* Appendix C at C40, Sec. 12D.15.[3]

AGCC's argument ignores an obvious course of action: summary adjudication of the case. *See Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *cert. denied*, ___ U.S. ___ [112 S. Ct. 875] (1992) [appeal of summary judgment for county in equal protection clause challenge to M/WBE bid preference program].[4] Indeed, as illustrated by *AGCC I*, nothing precludes AGCC members from pursuing summary judgment in a case in the District Court. Moreover, the court of appeals' discussion of the mootness doctrine in *Coral Construction Co.* contradicts AGCC's prediction that the Ninth Circuit has foreclosed the consideration of the merits of the City's MBE program in an appropriate case brought before it. *Id.* at 927-928.[5]

For these reasons, a denial of AGCC's petition is consistent with the long-held principle that this Court

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[3] Consistent with prior decisions of this Court, the City has limited the extent and duration of its remedial program. *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980) (Burger, C.J. opn.); *see also Croson*, 488 U.S. at 507-508 (discussing narrowly tailored prong of strict scrutiny test).

[4] AGCC does not mention *Coral Construction* in its petition, even though the case was deemed relevant to the instant case by the Ninth Circuit (Appendix A at A31-37). *Coral Construction* at 913.

[5] *See also City of Richmond v. Croson*, 488 U.S. at 478, fn. 1, where this Court noted: "The expiration of the ordinance has not rendered the controversy moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages."

will generally refrain from addressing a constitutional question where the posture of the case makes it unnecessary to do so. *See Schmidt v. Oakland Unified School District*, 457 U.S. 594 (1982). Allowing this case to go to final judgment at the District Court may well lead to a result that makes it unnecessary to decide the issues raised in this petition. In the event AGCC is unsuccessful, it may appeal that final ruling so that the Ninth Circuit or this Court may consider the merits of the MBE plan. *See Urie v. Thompson*, 337 U.S. 163 (1949) [denial of certiorari at interlocutory stage is without prejudice as to question presented].

C. The District Court and Ninth Circuit Properly Applied the Strict Scrutiny Tests Set Forth in *Croson* and *AGCC I*.

AGCC argues that the lower courts failed to properly apply the strict scrutiny test set forth in *Croson* and *AGCC I*. AGCC Pet. at 7-8. AGCC suggests that the lower courts are required to give greater weight to the plaintiff's evidence merely because the plaintiff alleges a violation of the equal protection clause. *See* AGCC Pet. at 8: "Rather than subjecting City's race-based bid preference to the strict scrutiny required of a suspect classification, the courts below apparently applied a standard of upholding the preferences if any evidence could be found to support them." *Ibid.*

In effect, AGCC argues that the scrutiny which applies in these cases should be "strict in theory but fatal in fact." *See Regents of University of California v. Bakke*, 438 U.S. 265, 361-362 (1978) (opn. of Brennan, White, Marshall

and Blackmun, JJ.). This result-oriented approach has long been discredited. *Ibid.* The District Court's duty in a preliminary injunction case such as this one is to determine whether the plaintiff has produced evidence of irreparable harm and whether the plaintiff is likely to prevail in showing that the challenged ordinance is not narrowly tailored to serve a compelling state interest. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). That is precisely what the District Court did in this case.

Thus, contrary to AGCC's suggestions, the District Court had no duty to embrace AGCC's presentation uncritically, or to view the City's evidence with suspicion. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 292-293 (1986) (O'Connor, J., conc. in part and conc. in judgment). The Court of Appeals evaluated the analysis made by the District Court, and correctly determined that the denial of the preliminary injunction was appropriate.[6]

II. THE DISTRICT COURT AND NINTH CIRCUIT PROPERLY CONCLUDED THAT AGCC FAILED TO DEMONSTRATE THE NEED FOR PRELIMINARY INJUNCTIVE RELIEF.

The traditional standard for granting a preliminary injunction requires that a plaintiff show that in the

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[6] Indeed, review of the District Court's action in this case is limited. (*See* Appendix A at A10.) With respect to findings of fact, the denial of a preliminary injunction can be reversed only if the District Court's findings of fact are clearly erroneous. *Ibid; see also South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 848 fn. 2 (11th Cir. (1984)), *cert. denied*, 469 U.S. 871 (1984).

absence of an injunction, the plaintiff will suffer irreparable injury and also that it is likely to prevail on the merits. In applying this test, a court must weigh carefully the interests on both sides. *Doran v. Salem Inn, Inc.*, 422 U.S. at 931. In this instance, the lower courts properly determined that AGCC failed to meet those standards.

A. The San Francisco Charter.

AGCC claims the Ninth Circuit erred in concluding that AGCC was unlikely to prevail on the merits of its state law claim. AGCC asserts that the 1989 Ordinance violates state law by effectively amending the San Francisco Charter without a vote of the people. AGCC Pet. at 8-12.

San Francisco's Charter is, in effect, its constitution. *Miller v. City of Sacramento*, 66 Cal.App.3d 863, 867 (1977). Charter Section 7.200 provides in relevant part:

> *When the expenditure for any public work . . . shall exceed the sum of . . . $50,000,* the same shall be done by contract, . . . The head of *the department in charge* of or responsible for the work for which a contract is to be let, . . . *shall let such contract to the lowest reliable and responsible bidder* . . . (emphasis added).

In *AGCC I*, the Ninth Circuit held that the bid preferences in the 1984 ordinance violated the lowest, reliable, responsible bidder provision of Charter Section 7.200 for construction contrasts over $50,000. *AGCC I*, 813 F.2d at 927. At the same time, the court held that the bid preferences for contracts *under* $50,000 did not violate Charter Section 7.200, because the competitive bidding requirement did not apply to such contracts. *Id.* at 927, 944.

Significantly, the City's Charter does not immutably fix the competitive bidding limit at $50,000. Charter Section 7.200 includes the following provisions for flexibility:

> Beginning with fiscal year 1987-88, *the board of supervisors shall be authorized to increase* or decrease *by ordinance the dollar amount set forth in any provision of this section.* (Emphasis added).

Pursuant to this section, on November 22, 1989, the City's Mayor approved Ordinance No. 424-89 ("the bidding threshold ordinance"), which raised the Charter-based competitive bidding threshold from $50,000 to $10 million. Appendix A at A22. Under the bidding threshold ordinance, only public works contracts over $10 million are subject to the Charter requirement that they be let to the lowest, reliable and responsible bidder. Preference for minority, women or local businesses *do not apply* to construction contracts over $10 million. *Ibid.*

The 1989 Ordinance is consistent with the Charter and *AGCC I:* No bid preferences are applied to any construction contract subject to the Charter's competitive bidding requirement. As of 1989, that requirement applies only to contracts over $10 million. The bid preferences at issue do not involve contracts above that limit. Accordingly, AGCC's challenge under the Charter is without merit.

In an effort to avoid this result, AGCC asserts that the people of San Francisco lack the power to allow the Board to adjust the bidding threshold through an ordinance. AGCC argues that Charter Section 7.200 allows the Board to amend the Charter in a manner that is "unauthorized" by the California Constitution; that is,

without a vote of the people. AGCC Pet. at 10-11. AGCC misstates both the record and California law.

In *AGCC I*, the Ninth Circuit recognized the "long-standing rule that there are no limits to a chartered city's regulation of municipal affairs except as expressly limited by the charter provisions." *Id.*, 813 F.2d at 927, citing *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 599 (1949); California Constitution Article XI, Sections 3(a), 5(a).[7] The award of construction contracts is a municipal affair and clearly within the people's power to regulate. *R & A Vending Services, Inc. v. City of Los Angeles*, 172 Cal.App.3d 1188, 1192 (1985) [award of contract by charter city "unquestionably a matter of municipal concern"]; *Smith v. City of Riverside*, 34 Cal.App.3d 529, 533-535 (1973) [award of public works contracts a municipal affair].

As the Ninth Circuit acknowledged, under Charter Sections 7.200 and 7.205, the people already have empowered the Board to establish bidding procedures and contracting requirements for the award of contracts.

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[7] California Constitution Article XI, Section 3(a) provides in relevant part: "For its own government, a . . . city may adopt a charter by majority vote of its electors voting on the question. . . . A charter may be amended, revised . . . in the same manner. . . . "

Article XI, Section 5(a) of the California Constitution, governing appropriate provisions in city charters, provides in relevant part: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters. . . . "

AGCC I, 813 F.2d at 927 fn. 9. Determining the appropriate monetary threshold at which construction contracts should be competitively bid is merely an extension of the Board's authority to implement bidding procedures. *See Service Employees Internat'l. Union Local 390/400 v. Board of Supervisors of the City and County of San Francisco*, 180 Cal.App.3d 1179, 1184-1185 (1986).

AGCC's reliance on *Montgomery v. Board of Administration of City Employees' Retirement System of San Diego*, 34 Cal.App.2d 514 (1939) is misplaced. AGCC Pet. at 10-11. That decision supports the City's position. The issue in *Montgomery* was whether the people of San Diego had authorized the city council to adopt ordinances *inconsistent* with the San Diego Charter. In this respect the court noted at pages 520-521:

> If section 146 of the Charter must be construed as giving authority to the city council of San Diego by ordinance to add to or subtract from the charter provisions or make regulations for the administration of the retirement system *inconsistent with the clear provisions of that document, it must be held to be unconstitutional as attempting to permit the amendment of the charter in an unauthorized manner.* (Emphasis added).

Significantly, the *Montgomery* court upheld as constitutional the provision of the San Diego Charter which allowed the city council to enact ordinances implementing the charter. *Id.* at 521. The court construed the charter as permitting the adoption of ordinances *consistent* with the charter provisions. *Ibid.* Here, the bidding threshold ordinance is completely *consistent* with the clear provisions of Charter section 7.200, and AGCC does not argue

otherwise. Both the ordinance and the part of Charter section 7.200 authorizing it are therefore constitutional. *Montgomery,* 34 Cal.App.2d at 520-521; *Service Employees Internat'l. Union Local 390/400 v. Board of Supervisors,* 180 Cal.App.3d at 1184.

Contrary to AGCC's claims, the Ninth Circuit also properly concluded that AGCC failed to show that the balance of hardships tipped in its favor on the state law claim. *See* AGCC Pet. at 11. As the District Court found, "92.7 percent of the City's prime construction contract dollars awarded to San Francisco firms went to non-MBEs, while only 7.3 percent went to certified *and* non-certified MBEs." Appendix B at B9, fn. 9. Accordingly, "it is apparent that AGCC members are competing for and winning the vast majority of construction contracts." *Ibid.* AGCC has not and cannot rebut this finding of fact. *See* Appendix A at A41. In short, there is no support in the record for AGCC's assertion that the 1989 Ordinance or the bidding threshold ordinance deprive AGCC members "of the opportunity to pursue a fundamental right [i.e., a lawful profession]." AGCC Pet. at 11-12.

AGCC apparently alleges that even if the bidding threshold ordinance is valid, the Ninth Circuit had to require the City to provide a race-neutral explanation for its action in order for the ordinance to be deemed valid. AGCC Pet. at 9-12. This argument is based on an assumption that the motivation underlying the bidding threshold ordinance was to discriminate against non-MBEs. AGCC Pet. at 11-12. But the Board's motivation underlying its adoption of the bidding threshold ordinance is irrelevant to the question presented here: Does the bidding threshold ordinance violate the Charter? And even assuming

the Board's motives or reasoning are relevant, there is no evidence that the Board acted for impermissible racially discriminatory reasons. Indeed, to ascertain the Board's motivations, AGCC would need to pursue further discovery on this issue. The forum to test its theory is the District Court.

B. The Equal Protection Clause.

AGCC argues that San Francisco's MBE program suffers from the same constitutional deficiencies present in the MBE plan in *Croson*. AGCC Pet. at 12-25. This claim fails when the evidence underlying the findings made in the Ordinance are contrasted with the evidence supporting the MBE plan at issue in *Croson*.

1. The *Croson* Test

a. Factual Basis for Richmond's Plan

The District Court in *Croson* upheld Richmond's MBE Plan ("the Plan") based on the following facts before the Richmond City Council:

> (1) The ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received .67% of prime contracts from the city while [Blacks] constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation

> in the construction industry nationally. 488 U.S. at 479-481, 499.

This Court rejected the evidentiary basis for the Plan, concluding that: (1) the mere recitation of a benign or legitimate basis for a racial classification is entitled to little or no weight; (2) the testimony submitted to the Richmond City Council, which was conclusory, unrelated to Richmond's construction industry and too generalized, had little probative value; (3) race-conscious action may not rely on contrasts between the minorities' share of the general population and minorities' share of prime contract dollars; (4) the mere paucity of minority business membership in local contractors' associations, without more, is not probative; and (5) Congress' findings of nationwide discrimination in the construction industry cannot be used by Richmond to justify a similar local MBE program. *Id.* at 498-506.

At the same time, this Court was careful not to close the door on race-conscious, remedial affirmative action programs in public contracting. The Court noted at page 504:

> While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

Significantly, "some showing of prior discrimination by the governmental unit involved," *Wygant v. Jackson Board of Education*, 476 U.S. at 274, is *not* a prerequisite to a valid affirmative action program in public contracting. *Croson*,

488 U.S. at 492-493; *see also id.*, at 528-550 (Marshall, J., dissenting).

The Court indicated the type of strong evidentiary basis that would support a legislative identification of discrimination and consequently justify the adoption by a municipality of a remedial race-conscious program: (1) first-hand testimony of racial discrimination (*see Croson*, 488 U.S. at 500-501); (2) testimony of private sector discriminatory practices in the relevant industry or locality (*ibid*); (3) a significant statistical disparity between the percentage of contracts or contract dollars awarded to qualified minority contractors and the percentage of the qualified contractors that are minority. (*Id.* at 501-502; *Wygant v. Jackson Board of Education* at 274-275 (plurality opinion)); (4) still other facts presented to a municipality may be sufficient to justify affirmative action. *See Croson*, 488 U.S. at 492 [evidence showing that city is a "passive participant" in a system of racial exclusion practiced by the local construction industry]; *id.* at 503-504 [significant statistical disparity between local MBEs eligible for membership and MBE membership in local contractors' association]; *id.* at 509 [city may act to dismantle a closed business system set up by the city or its prime construction contractors].

The evidence before the District Court here demonstrates that the factual predicate supporting San Francisco's MBE ordinance satisfies these standards.

2. The 1989 Ordinance is Constitutional Under *Croson*.

a. The Factual Predicate of the 1989 Ordinance.

As stated, the City undertook an extensive fact-finding process to ascertain whether there was cause to extend the 1984 ordinance. The Board received two statistical studies, one from its Budget Analyst and the other from BPA Economics, Inc. Appendix C at C2-C8, Sec. 12D.2. In addition, the Board conducted ten public hearings, took testimony and written submittals. *Ibid.* In Section 12D.2 of the 1989 Ordinance, the Board relied upon testimonial and statistical evidence gathered by the City in 1983, 1984, 1988 and 1989, and made the following key findings which apply to the award of public construction contracts:

> 4. The testimony of businesses that seek to enter into contracts with the City or are doing business with the City, as presented to this Board and as detailed in the Human Rights Commission's 1988 report, offer clear and persuasive reasons for the Board of Supervisors to take the actions proposed by this Ordinance to remedy: (1) City contracting practices and community conditions that cause the exclusion or reduce the opportunities of minority and woman owned businesses to be awarded City contracts to such an extent that the amount of City contract dollars awarded to them can only be explained by discrimination; and (2) competitive disadvantages local business continue to face in providing goods and services to the City.

* * *

10. Some City departments continue to operate under the "old boy network" when awarding contracts. The City's "old boy network" constitutes a closed business system created and implemented by the City for all contracts, including those subject to the competitive bid process. Discrimination against and insensitivity to MBEs and WBEs continue to persist in the City's procurement process. The closed environment in which City businesses operate has excluded MBEs and WBEs and has placed them under a competitive disadvantage when competing for City prime contracts.

11. The statistical evidence before this Board relating to the award of contracts subject to this Ordinance for fiscal year 1987-1988 reflects that in almost all areas of contracting MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars that are disproportionately lower than the available numbers of MBEs and WBEs in San Francisco. These data are gathered and summarized in Appendix X, which contains utilization indices described as Tables 1 through 7, and 10 through 11, and is attached to this Ordinance and incorporated herein by reference as though fully set forth. These utilization indices measure the disparity between MBEs (as a group and each ethnic group identified as a minority) or WBE participation in City prime contracts and their share of their relevant industry or profession. That disparity is measured in terms of a statistical significance. When measure of the statistical significance is minus two (-2) or less, the Board concludes that the disparity cannot be attributed to chance.

> Based upon the weight of the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the statistical disparities can only be attributed to discriminatory procurement practices of the City against MBEs and WBEs.
>
> Based on the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the aforementioned statistical disparities are also attributed to discrimination in the private sector against MBEs and WBEs that is manifested in and perpetuated and exacerbated by the City's procurement practices.

Appendix C at C4, C7, C8.

In Section 12D.9 of the 1989 Ordinance, the Board made these additional findings regarding the award of public construction contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime public works/construction contracts.

2. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime public works/construction contractors willing and able to perform City construction work. These results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988 and 1989, this

Board finds that these results can only be attributed to discriminatory procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City prime construction contracts.

4. Race-neutral measures employed by the City in the past for those construction contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring.

5. The Board is granting a competitive advantage, the bid preference, to MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

Appendix C at C26, C27.

After reviewing the massive legislative file in support of the 1989 Ordinance, the District Court concluded that San Francisco's ordinance did not suffer from the deficiencies identified in Richmond's Plan. Specifically, the District Court found:

> Here, San Francisco has done far more than declare a benevolent purpose and point to generalized discrimination in the construction industry and statistics with little probative value. Rather, it has "identified discrimination" against MBEs in San Francisco by both the city and private contractors.

Appendix B at B17.

The Ninth Circuit conducted its own review of the District Court's decision and concluded that "the record

documents a vast number of individual accounts of discrimination, which bring 'the cold [statistical] numbers convincingly to [life]'." Appendix A at A34.

Without directly challenging this conclusion, AGCC identifies two alleged errors of law by the Ninth Circuit.[8] First, AGCC asserts that the Ninth Circuit accepted the same kind of "generalized assertions" of past discrimination as those deemed insufficient in *Croson*. AGCC Pet. at 13-14. In fact, the Ninth Circuit found that the City's findings in the 1989 Ordinance were substantially more specific than those found inadequate in *Croson*. Appendix A at A36. The appellate court said of the findings: "[T]hey are clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts." *Ibid.*

In *Croson*, this Court required a municipality to "identify discrimination" before embarking on a race-conscious program. *Id.* 488 U.S. at 505. There is no mandate that the legislative findings specifically detail each and every instance that the legislative body has relied upon in support of its decision that affirmative action is necessary. *Id.* at 500, 505. In her concurring opinion in *Wygant*, Justice O'Connor explains the function and nature of findings adopted by the local government in affirmative action cases:

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[8] AGCC's challenges to issues of fact are addressed in sections I.A. and B., *supra*.

> A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the wrongs suffered through general societal discrimination. . . . Such findings, when voluntarily made by a public employer, obviously are desirable in that they provide evidentiary safeguards of value to both nonminority employees and to the public employer itself, should its affirmative action program be challenged in court.

Wygant, 476 U.S. at 289-290; *see also id.* at 304-305 (Marshall, J. dissenting); *Cf. Croson*, 488 U.S. at 501 ("[W]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination.") Consistent with *Croson* and *Wygant*, the 1989 Ordinance sets forth with specificity the identified discrimination that the City is attempting to remedy.

b. The "Narrowly Tailored" Prong.

The second alleged error of law concerns the Ninth Circuit's application of the "narrowly tailored" prong of the strict scrutiny test. AGCC Pet. at 16-26.

In *Croson*, this Court had difficulty assessing whether Richmond's Plan was narrowly tailored because it was "not linked to identified discrimination in any way." *Id.*,

488 U.S. at 507. However, the Court made two observations about the MBE Plan. First, Richmond did not evaluate race-neutral measures before adopting the race-based set-aside. *Ibid.* Second, this Court viewed the 30% set-aside as irrelevant to any goal "except perhaps outright racial balancing," because of the set-aside's gross over-inclusiveness. *Id.* at 479, 507.

In order for a plan to be "narrowly tailored," a municipality need not adopt every possible race-neutral means to cure the problem before instituting a race-conscious program. *Croson*, 488 U.S. at 469. Unlike the City of Richmond, San Francisco considered and adopted several race-neutral measures in conjunction with the MBE program. *See* Appendix A at A38-39. San Francisco took a balanced approach by utilizing those race-neutral means that were reasonable under the circumstances.

While AGCC focuses on the Board's legislative Finding 13, Appendix C at C8, which considered and rejected certain race-neutral or less drastic methods, AGCC overlooks other relevant sections of the 1989 Ordinance which specifically address race-neutral or less drastic means adopted prior to or in conjunction with the 1989 MBE bid preference plan.[9] *See* Board of Supervisors' legislative Finding 12 at Section 12D.2, Appendix C at C8 [City adopts guidelines to standardize bond and insurance requirements for City contracts; *see also* Section 12D.8.(B), Appendix C at C21-C24, *e.g.* Sections 12D.8.(B)1 [City

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[9] AGCC concedes that an MBE plan is narrowly tailored if the plan is instituted "either after, or in conjunction with race-neutral means of increasing minority business participation in public contracting." AGCC Pet. at 16.

must make good faith efforts to solicit and obtain bids from MBEs]; 12D.8.(B)3 [contracting must be arranged by size and type of work to facilitate MBE participation]; 12D.8.(B)4 [City is to adjust bid bonding and insurance requirements as recommended by City Risk Manager]; 12D.8.(B)5 [City to use revolving fund that may be established to help MBEs meet bonding/insurance requirements]; 12D.8.(B)11 [City to provide MBEs with technical assistance].

AGCC suggests that enforcement or enactment of nondiscrimination laws in and of itself would cure the problems identified by the City. AGCC Pet. at 24-25. The evidence is to the contrary. The Board found, *inter alia*, that MBEs operate at a competitive disadvantage when seeking business with the City. Appendix C at C7, Section 12D.2 [Finding 10]. As the record reflects, previous enforcement of the City's nondiscrimination ordinance did not correct the competitive disadvantages suffered by MBEs as a result of discriminatory procurement practices. Appendix A at A39. The bid preference is a narrowly tailored method to equalize the position of MBEs *vis-a-vis* non-minority contractors.

Since *Croson*, appellate court decisions have provided guidance about the "narrowly tailored" prong. The Ninth and Eleventh Circuits have held that one indicator of a "narrowly tailored" MBE plan is program flexibility. *Coral Construction Co. v. King County*, 941 F.2d at 924; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990), *cert. denied*, ___ U.S. ___ [111 S.Ct. 516] (1990). San Francisco's MBE program has the elements of a "narrowly tailored" plan.

First, for construction contracts, the Board granted MBEs "a competitive advantage, the bid preference, . . . to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices." Appendix C at C27 [Finding 5]. The City chose a remedy that most closely addressed the identified problem. Appendix A at A40, fn. 12. The City found that the remedy it selected, a 5% bid preference, was a "competitive plus," Appendix C at C5 [Finding 7], and was a modest attempt by the City to open up a previously closed business system the City had created. *Id.* at C7, Sec. 12D.2. [Finding 10].[10] The City narrowly tailored its remedy by choosing to give appropriate MBEs a competitive bidding advantage rather than setting rigid goals or setting aside specific contracts exclusively for MBEs.

Second, under the ordinance, even non-minority firms can take advantage of the bid preference; they can joint venture with MBEs. Appendix A at A41; Appendix C at C21-C22, Section 12D.8.(B)2. The reasonableness of the City's approach is demonstrated by the relatively small burden non-MBE contractors have suffered under the 1989 Ordinance. *See* Appendix A at A41. The fact that San Francisco MBEs have received just over 7% of City contracting dollars under the ordinance (*see* Appendix B at B26) shows that AGCC's membership is still able to benefit significantly from the City's prime contracting program.

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[10] AGCC mischaracterizes the MBE bid preference at issue. It is a 5%, not 10%, race-conscious bid preference. Appendix A at A8; *see* AGCC Pet. at 22-23.

Third, the bid preference is only permitted where it is tied to the underrepresentation of a particular minority group. This underrepresentation is determined by comparing contracts awarded to minority business enterprises with the number of minority business enterprises available to do the work. Appendix A at A39-A40. In contrast, the City of Richmond relied upon general population statistics. *Croson*, 488 U.S. at 501. In addressing the actual exclusion of minority business enterprises, San Francisco has narrowly tailored its use of the bid preference to those groups which were specifically identified as having been discriminated against. Appendix A at A39-A41.

Finally, the flexibility of the ordinance is also demonstrated by its waiver provisions. AGCC's argument that a waiver is only applicable where no MBEs are available ignores the fact that this is a bid preference ordinance and not a set-aside law guaranteeing that certain contracts go to MBEs. There is only one reason, other than fiscal savings, for the City to waive the bid preference requirements: Where there has been no documented pattern or practice of discrimination against MBEs. In those circumstances, majority businesses may seek waivers of the bid preference granted MBEs. Appendix C at C17-C18, Section 12D.6.(A)4.

Thus, unlike the City of Richmond, San Francisco's bid preference benefit is not solely based on race but is conferred on members of groups which were determined to have suffered discrimination. The City adopted the bid preference plan after thorough analysis of statistics and oral and written testimony. By tailoring its ordinance to the discrimination found to exist against particular

groups, the City has overcome the problem of improperly benefiting those who have not necessarily been affected by discrimination in the public contracting process. *Cf. Croson*, 488 U.S. at 506.

AGCC inaccurately characterizes as quotas the numerical indices used by the City to measure the law's effectiveness. AGCC Pet. at 10-19. The indices are used solely to ascertain when the ordinance should expire. Appendix C at C9. Further, the numbers are adjusted annually to assure the measures remain accurate. *Id.* at C19, C21, Sections 12D.6.(B)2, 12D.8.(A)(1). There is no requirement that contracts be set aside for MBEs at a certain rate or that any percentage of contracts go to MBEs. The indices are necessary to ensure the bid preference does not continue once the competitive disadvantage from which MBEs suffer is eliminated. Appendix C at C19, Section 12D.6(B)2.

AGCC's final attack on the 1989 Ordinance as not being narrowly tailored is a bold attempt to reopen settled law regarding whether a racial preference program must benefit only individuals who are the victims of discrimination. *See Wygant v. Jackson Board of Education*, 476 U.S. at 274-276; *Local Number 93, Internat'l Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers' Internat'l Association v. E.E.O.C.*, 478 U.S. 421 (1986). *Croson* did not change this aspect of the law. There, this Court was concerned that the overinclusiveness of Richmond's law allowed minority *groups* which had not suffered discrimination to benefit. *Croson*, 488 U.S. at 506. No such infirmity exists in the San Francisco law. It is carefully tailored to the particular situation

of individual minority groups. Appendix C at C10, Section 12D.4.

Nor is the ordinance unconstitutional simply because the preference is only provided to "economically disadvantaged" MBEs which are determined to be disadvantaged according to the amount of business they do. *See* AGCC Pet. at 21. Every beneficiary of an affirmative action program need not prove that he or she is a victim of discrimination. *See Wygant*, 476 U.S. at 274-275. Similarly, to pass constitutional muster, an ordinance such as San Francisco's need not require that each MBE prove that it was a victim of discrimination and economically disadvantaged by such discrimination before seeking the bid preference. In fact, inclusion of the $14 million cut-off for the definition of disadvantaged MBEs (Appendix C at C12) assures that the ordinance does not provide a windfall to an MBE that no longer suffers the effects of discrimination. *See Cone Corp.*, 908 F.2d at 917. The 1989 Ordinance is narrowly tailored.

CONCLUSION

The 1989 Ordinance is a carefully written instrument, narrowly tailored to achieve its express remedial purpose while containing flexibility to ensure it is not implemented to unfairly burden non-minority businesses.

In the District Court, AGCC failed to sustain its burden of demonstrating either probable success on the merits, irreparable injury or that the balance of hardships tips sharply in its favor. Accordingly, the Ninth Circuit properly affirmed the District Court's denial of AGCC's

motion for a preliminary injunction. For all the foregoing reasons, this Court should deny AGCC's petition for a writ of certiorari.

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Respectfully submitted,

LOUISE H. RENNE
City Attorney
MARA E. ROSALES-CORDOVA*
Deputy City Attorney
206 City Hall
San Francisco, CA 94102
(415) 554-4218

Attorneys for Respondent City and County of San Francisco

*Counsel of Record for Respondent

EVA JEFFERSON PATERSON*
THEODORE HSIEN WANG
San Francisco Lawyers' Committee for Urban Affairs
301 Mission Street
Suite 400
San Francisco, CA 94105
(415) 543-9444

Attorneys for Intervenors

*Counsel of Record for Intervenors